Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

David Arnold

Petitioner

v.

Arlene Arnold

Respondent

On Petition For Writ of Certiorari
To The Supreme Court
of the State of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the fourteenth amendment allow a state court to deny a fit parent, that lives apart but in the same community as the other parent, equal periods of placement of his or her children without a finding that this would be harmful to the children?

2. Are Wisconsin statutes, that allow the state to intrude into a family without first requiring some threshold determination that a parent is unfit, or that maximizing placement with each parent may be harmful to the child, unconstitutional?

LIST OF PARTIES

David Arnold is the father of the three children impacted in this case and is Petitioner.

Arlene Arnold is the mother of the three children impacted in this case and is Respondent.

State of Wisconsin is an interested party since the constitutionality of Wisconsin Statutes is being challenged in this case. The State did not participate at the district or appellate proceedings in this case.

Attorney Joseph Alioto is the court appointed guardian ad litem in this case. He did not submit any briefs in the appellate proceedings in this case.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUES AND REGULATIONS AT ISSUE 2

STATEMENT OF CASE AND FACTS 3

WHY CERTIORARI SHOULD BE GRANTED 7

Introduction: 7

A. Review is warranted because the State courts' decisions in this case conflict with numerous decisions of this court and the 14th amendment

i. Applicable legal standards 9

14th amendment

Troxel. v. Granville

Dunn v. Blumstein

Bush. v. Gore

ii. The state courts did not properly apply these legal standards to the circumstances in this case. 12

iii. Wisconsin statutes, that allow the state to intrude into a family without first requiring some threshold determination that a parent is unfit or that maximizing placement with each parent may be harmful to the child, are unconstitutional. 16

B. Review is warranted because Wisconsin Courts have failed to enforce recent legislative changes that harmonized Wisconsin statutes with the principles of equal protection of fundamental rights of parents . 22

C. Review is warranted because each year hundred of thousand's children and parents in non-intact families, are being harmed by the unnecessary and unjustified intrusion of family courts in Wisconsin and other states. 24

D. Review is warranted because this issue will recur, unless resolved by this court. 27

Conclusion 28

Appendix 29

TABLE OF AUTHORITIES

	Pages
United States Constitution:	
14th amendment	2 , 9, 11, 24
Federal Cases:	
Bush v Gore 531 US 98 (2000)	12, 15, 19
City of Boerne v. Flores	21
521 U.S. 507, 534(1997)	18
Dunn v. Blumstein,	
405 US 330, 342-43(1972)	11, 12,15, 24
Harris v McRea 448 US 297, 312 (1980)	21
Troxel. v. Granville	
530 U.S. 57 (2000)	6, 9, 10, 11, 14, 17, ,18, 19, 23
Zablocki, 434 U.S. at 387.	11
Wisconsin Statutes:	
765.001 (2) and (3)	3, 17
767.045(1)(a) 2 and (4)	3, 17
767.24(1m)	3, 17, 22
767.24(4)(a)	3, 5, 17, 22, 23
767.24(4)(b)	3, 5, 17, 22
767.24(5)	3, 17, 18
767.325 (1) (b)	3, 17, 18
Wisconsin Acts:	
1987 Wisconsin act 355	22
1999 Wisconsin act 9	21, 22, 24
Wisconsin Cases:	

Arnold v. Arnold, 679 N.W.2d 296 1
Keller v. Keller, 647 N.W.2d 426 5

New Hampshire Cases:
LeClair v. LeClair,
137 N.H. 213, 624 A.2d 1350 (1993) 6, 19, 20
Pennsylvania Case:
Curtis v. Kline, 542 Pa. 249, 666 A.
2d 265 (1995). 20

Institute for Research on Poverty 7

OPINIONS BELOW

The April 20, 2004 order of the Supreme Court of Wisconsin denying petition for review, from which Chief Justice Shirley Abrahamson dissented, is included on page A1 of the appendix.

The February 4, 2004 order of the State of Wisconsin District II Court of Appeals is reported at *Arnold v. Arnold* 679 N.W.2d 296 and is included on pages A2-A7 of the appendix.

The May 7, 2003 order of the State of Wisconsin, Circuit Court of Waukesha County is included in on pages, along with the related portion of the transcript of the verbal order on pages A8 to A25 of the appendix.

JURISDICTION

On October 28, 2002, David Arnold filed a motion, affidavit, brief and parenting plan with the State of Wisconsin, Circuit Court of Waukesha County, asking the court to support the fundamental rights of both parents and order equal placement of the children with each parent. (R-13, A26-35)

After a February 19, and 20, 2003 hearing, Waukesha County Circuit Court Judge Ralph Ramirez denied this motion and issued an order limiting the children's placement with David Arnold, during the school year, to every other Friday to Monday rather than every other Friday to Friday that David Arnold believed was in the best interest of the children, and necessary to provide equal protection of the fundamental rights of both parents. (R-28, A8-12)

This order was appealed to the State of Wisconsin District II Court of Appeals. On February 4th, 2004, this court ruled there

was no statutory or fundament right to equal placement and affirmed the trial court's order.(A2-7)

A petition for review was filed before the Supreme Court of Wisconsin. On April 20, 2004 the petition for review was denied. (A1)

David Arnold has exhausted all remedies in the courts of the State of Wisconsin. He raised a question of law protected by the 14th amendment of the United Stated Constitution at the trial and appellate proceedings. Since this "Petition for Writ of Certiorari" is filed within the 90 days of the denial of the petition of discretionary review by the Supreme Court of Wisconsin, this court has jurisdiction under 28 U.S.C. 1257(a).

Since a question of constitutionality of Wisconsin's statutes is raised in this Petition, 28 U.S.C. 2403(b) may apply, Therefore, three copies of this Petition will be served upon the Attorney General for the State of Wisconsin.

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE

Fourteenth amendment of the United States Constitution

Wisconsin's child placement statutes, that allow the state to intrude into a family without first requiring some threshold determination that a parent is unfit or that maximizing placement with each parent may be harmful to the child, including

Wis. Stat. 767.045(1)(a) 2 and 4
the second sentence of 767.24(4)(a)
767.24(5)
767.325 (1)(b)

The text of these is included on pages A36-42 of the appendix.

STATEMENT OF CASE AND FACTS

David Arnold ("David') and Arlene Arnold ("Arlene") were married in 1990. They have three children, Jourdan, (born 1/12/93), Jacob (born 8/4/96) and Hannah (born 1/16/98).

Both Arlene and David are employed full time as engineers in the Milwaukee area. The children attend Elm Grove Lutheran School, which is approximately 6 miles from David's residence and 15 miles from Arlene's residence. Child care is provided at the school before and after school, until either Arlene or David pick them up after work.(R-13)

On January 28, 2000 Arlene filed a motion for divorce.(R-1).

On November 15, 2001 Arlene and David reached a stipulated temporary agreement in regard to custody and placement. This agreement provided that both parties are fit and proper persons, primary placement with Arlene, and placement with David every other Friday after school till Monday morning, and one additional overnight each week during the week, plus holidays. The summer placement schedule was alternating weeks with each parent. (R-9, p 1 and 3).

A hearing was held on November 15, 2001 in regard to other issues of the divorce. The trial court issued a verbal decision,

which granted the divorce, accepted the parties stipulated temporary agreement regarding placement of the children and on page six noted " The court will hold a review in six months." This order was signed on January 28, 2002.

On August 12, 2002, Arlene filed a motion for contempt on various issues and asked the court to reduce the number of mid-week placement transitions between the parents.(R-12)

On October 28, 2002, David filed a motion, affidavit, brief and parenting plan, asking the court to simply equally support the fundamental rights of both parents and order equal placement with each parent. (R-13, A26-35) .

On November 5, 2002 a pre-trial hearing was held, trial court did not address the issues in David's motion and trial was scheduled for February 19 and 20, 2003.

On February 19 and 20, 2003 a motion hearing was held regarding the placement issue. Arlene submitted her parenting plan, asking that David's mid week placement be reduced and that David only be allowed to care for the children on alternating weekends throughout the entire year. (R-24 exhibit 1)

At the conclusion of the hearing, on February 20, in issuing the verbal decision Judge Ralph Ramirez noted:

> *"I see two parents who are absolutely, totally in love with their children, as it should be, and absolutely want to do the best that they can for these children."* (R-25,p2; A14)
>
> *"The children love both parents, it's apparent to me. The parents love all of their children."* (R-25, p 6; A18)
>
> *"As I have said, both Mr. Arnold and Ms. Arnold are fit and proper persons to parent these children, and there's no indication whatsoever that the children are in any danger*

of any harm with either of the parents." (R-25,p 10; A22)

"I am. As set out in Ms. Kelly's report, of the belief that the children are certainly emotionally attached to both parents." (R-25, p 11; A23)

Item 4 of the court's written order, ordered placement with David to be alternating weeks during the summer. Item 5A of the court's written order, however, only ordered placement with David every other weekend from commencement of day care on Friday to commencement of day care on Monday during the school year. The new order results in placement with David approximately 102 days per year, not the 182.5 days per year, which he believes is in the best interest of the children in satisfying his equal interest in fundamental responsibility for raising our children. This order was signed on May 7, 2003. (R-28 p1,2; A9).

David appealed this decision on the grounds that "The trial court erred by not maximizing the amount of time the children spend with each parent, as required by the most recent and specific statutory provision of 767.24(4)(a)2 and by not enforcing the court's responsibility to provide equal protection of the fundamental responsibility and right of both parents to raise their children, and the children's right to placement with both parents per 767.24(4)(b)." David pointed out that these legal issues were never raised and addressed in a previous Wisconsin Appellate decision in *Keller v. Keller*.

In the February 4, 2004 decision (A2-7), the Appellate court declined to address the statutory legal issues raised in David's appeal on the ground that it had no authority to overrule a previous published appellate court ruling in *Keller*.

The Appellate court did address the constitutional claims. It affirmed that parents in divorces have an equal fundamental right.(A5) However it declined to address the issue that courts have responsibility to support the equal protection and

substantive due process provisions of the 14th amendment of the United States Constitution of these rights. The Appellate court rejected the legal standards established by this Court in *Troxel v. Granville,* 530 U.S. 57, 65 (2000) and instead relied on a older Supreme Court on New Hampshire finding in *LeClair v. LeClair*, 137 N.H. 213, 624 A.2d 1350 (1993) to justify "heightened judicial control over divorced families because of unique problems that exist in a home that is split by divorce."

On February 28, 2003, David petitioned the Wisconsin Supreme Court to review the same issue raised in the appellate court. On April 20, 2004, the Wisconsin Supreme Court denied the petition. Chief Justice Shirley Abrahamson dissented with this decision.

Further background information:

David Arnold has been fully involved with the children since the day they were born, while married, and to the extent allowed by the court orders since the divorce. He is in full compliance with the court's child support order and has additionally been paying for all of the children's expenses while in his placement and half of the day care cost.

WHY CERTIORARI SHOULD BE GRANTED

A. Review is warranted because the State courts' decisions in this case conflicts with numerous opinions of this court and the 14th amendment.

On numerous occasions this court has ruled that the 14th Amendment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children, which can not be interfered with absent a compelling state purpose.

Since non of these cases specifically dealt with the growing number of cases where two fit parents are divorced, or never married, and both want to be fully involved in the raising of the children, family courts in Wisconsin and in the rest of the country nonchalantly dismissed the limitations on their powers established by this court, in these cases.

Changes in society and laws[1] have lead many divorced and paternity fathers like David to seek full involvement in the care, custody and control of their children. An increasing number of fathers are asking not for the every other weekend visitation commonly ordered in the past, but for every other week placement (a/k/a in other states as physical custody, parenting

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[1] Recent studies by Wisconsin's Institute for Research on Poverty point out that the number of shared placement cases in Wisconsin has increased from less than 2.5% of all cases before 1987 to 23.1% in 1996-8, with 15.1% of the cases being awarded equal placement and that three years after an order is issued there is a 90% compliance with the original order. These reports demonstrate that parents can adequately exercise their fundamental parental responsibilities and rights during their respective equal placement periods and also demonstrate that when state statutes reduce legal obstacles for non-custodial parents to exercise their responsibility and rights to their children, such as 1987 Wisconsin Act 355 did, many parents will do so. 1999 Wisconsin Act 9 further established a new criteria requiring courts to maximize the time children spend with each parent.

time) of their children. Without any more transitions for the children, this allows fathers, like David, to more naturally assume an equal parental role rather than a mere "court permitted visitor" role, which greatly restricts their ability to parent their children.

Courts commonly approve equal placement orders when both parents agree to them. If however one parent does not want the other parent equally involved, rather than simply enforcing the equal protection of the fundamental roles of each parent, family courts, initiate a highly intrusive expensive adversarial process that is aimed at resolving the vague and arbitrary question "What is in the best interest of the child?", even when there is no evidence that either parent is unfit, there are geographic or accommodation issues that would make this impractical or that this would be harmful to the child.

The published Wisconsin appellate court decision in this case, affirming the trial court's order and finding that fit divorced parents have no fundamental right to equal placement, denies Wisconsin children and their parents the fundamental right established by the US Supreme Court and protected by the 14th amendment of the United States Constitution.

The importance of this case is not limited to Wisconsin, since family laws in other states have similar unnecessarily intrusive schemes of resolving child placement disputes between fit parents. In the Unites States, 16.5 million children primarily live with single mothers, 3.3 million live primarily with single fathers, and 49.7 million live in two parent households. If 20% of the two parent household include a step parent, then approximately 30 million children are living in families where the natural parents live apart. In addition, of the 4 million births each year about one third (1.3 million) are to unwed mothers.

This case could have a significant impact of assuring the 30 million children that live in non-intact families a similar opportunity to have equal access to both parents as children

enjoy in intact families, without unnecessary, expensive and harmful governmental intrusion.

i. Applicable Legal Standards:

The Fourteenth Amendment of the United States Constitution states,

> *"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."*

The essence of this constitutional principle is that like persons in like circumstances will be treated similarly.

The parental roles of mothers and fathers should be treated similarly. The parental roles of fathers in non intact families should be treated similarly as those of fathers in intact families. The parental roles of fathers in non intact families in similar circumstances should be treated similarly. Children in non intact families should have a similar opportunity as children in intact families to have equal access to both parents.

Just four years ago in ***Troxel v. Granville*, 530 U.S. 57** (2000), this court addressed the authority of state courts to intrude into a fit parent's child placement decision(a/k/a physical custody, parenting time, or visitation).

This court ruled:

> *"the interest of parents in the care, custody, and control of their children - is perhaps the oldest of the fundamental liberty interests recognized by this court." Id. at p.65*

"In light of this extensive precedent, it cannot now be doubted that the due process clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children." Id. at p.66

"So long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the state to inject itself into the private realm of the family to further question the ability of that parent to make decisions concerning the rearing of that parent's children." Id. at p.68, 69

"there is a presumption that a fit parents act in the best interest of their child."Id. at p.68.

"the Due Process Clause does not permit a state to infringe on the fundamental right of parents to make child-rearing decisions simply because a state judge believes a 'better' decision could be made." Id. at p.72, 73.

This Court let stand the Washington Supreme Court's finding that the states's third party visitation statutes, which allow the court to award custody to third parties based solely on what the court determines is "in the best interest of the child", to be unconstitutional and that "*the Constitution permits a State to interfere with the right of parents to rear their own children only to prevent harm or potential harm to a child.*"

Troxel is the most recent decision closest to the issues in this case since it specifically dealt with a state court's intrusion into child placement dispute between two fit parties, such as in this case. The only distinction from this case is that *Troxel* dealt with a dispute between a fit parent and a fit grandparent, while this case deals with a dispute between two fit parents.

Since the substantive due process and equal protection provisions of the 14th amendment of the United States Constitution equally protect the responsibilities and rights of both parents and the children, it is an easy and natural extension that in disputes between two fit parents, each maintains an equal interest in this fundamental right and responsibility without unjustified governmental intrusion.

Since a parent's ability to care and nurture his or her children is directly proportional to that parent's physical access to his or her children, the only way two parents living separately can equally exercise this statutory and fundamental responsibility and right is for each to have an unobstructed opportunity to assume equal physical placement of his or her children. Absent a compelling reason, the court cannot allow one parent, a guardian ad litem, a psychologist, placement study evaluator, a court commissioner or the court's own personal feelings to obstruct the equal role of either parent to make this decision on behalf of the children without a compelling state interest.

While the right is not absolute, it is a basic right with which the state may not interfere absent a **compelling** reason. Statutes that directly and substantially impair fundamental rights require strict scrutiny. *Zablocki*, 434 U.S. at 387. and

> *"The 14th Amendment's Due Process Clause, ... guarantees more than a fair process. ... The clause also includes a substantive component that provides heightened protection against governmental interference with certain fundamental rights and liberty interests."* *Troxel*, Id at 57, 65

In ***Dunn v. Blumstein*, 405 US 330, 342-43(1972)** this court noted

> *"The State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with "precision,"* and *"If there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means."*

In ***Bush v. Gore* 531 U.S. 98, 109 2000**, this court noted :

> *"When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal protection and fundamental fairness are satisfied."* and
>
> *"The recount mechanism implemented in response to the decisions of the Florida Supreme Court (" to consider the intent of the voter") do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right."* Id. at p. 105.

ii. The state courts did not properly apply these legal standards to the circumstances in this case.

On October 28, 2002, David filed a motion, affidavit, brief and parenting plan, (A26-36) asking the court to simply support the fundamental rights of both parents and order equal placement with each parents. He communicated to the trial court his belief that the best interest of the children would be served by having both parents equally involved in the raising of their three children. In his affidavit he demonstrated that both parents live and work in the same community and that there were no issues that would make equal placement not workable.

The court held a hearing on February 19 and 20th 2003.

At the conclusion of the hearing the trial court found *"The children love both parents, it's apparent to me. The parents love all of their children."* (R-25,p 6; A18), that *"there is no reason to believe that he(David) isn't willing to work in the best interest of the children, ... that he's not able to make decisions in the best interest of the children, that he isn't able to exercise appropriate custody or decision-making over the children, but for the fact that he cannot work with Miss Arlene Arnold, and for that reason, there has to be some modification in regards to the decision-making and the custody of the children....And although allowing for the continuation of joint legal custody, I will provide -- I will grant final decision making process, the right to make final decisions as to educational issues and non emergency medical and dental issues to Miss Arlene Arnold."*(R-25,p 8-9; A20-21)

In regard to placement the court found " *both Mr. Arnold and Ms. Arnold are fit and proper persons to parent these children and there's no indication whatsoever that the children are in any danger with either parent"* (R-25,p 10; A22), there is nothing that *"would lead me to believe that he cannot provide for the children and take care of them while the children are placed with him"*(R-25,p 11; A23). The court then ordered placement of the children with David on alternating weeks during the summer, but only every other Friday to Monday during the school year. The court order deprived David of his fundamental right to direct the upbringing of the children every other Monday to Friday during the school year.

While Wisconsin Statutes and court rulings give trial courts great discretion to make decisions that are in the best interest of the children, these decisions must be consistent with the limitations on state courts' powers set forth in decisions of this court, and other statutory provisions passed by the Wisconsin legislature.

In light of the court's findings about the parents' anger and inability to communicate[2], the trial court's order giving *"final decisions as to educational issues and non emergency medical and dental issues to Miss Arlene Arnold."* is not in dispute.

However in this case, there was no clear and convincing evidence that would support the conclusion that the equal placement during the school year requested by David would harm the children. Instead the trial court found that David was a fit and proper parent that can adequately care for the children when they are placed with him. The court failed to give proper weight to the fundamental responsibility of a fit parent to decide how best he can secure the best interest of the children in satisfying his equal interest in the raising of the children.

> *"the Due Process Clause does not permit a state to infringe on the fundamental right of parents to make child-rearing decisions simply because a state judge believes a 'better' decision could be made." Troxel at p.72, 73*

While the court may have been justified in restricting some of David's fundamental rights to make certain decision regarding the children, there was no finding that justified further and permanently restricting David's placement periods during the school year.

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[2] Anger and inability to communicate between the parties is a natural outcome of the adversarial relationship and financial burdens that the family court process forces upon parents. Since the divorce started, David has been denied equal access to his children and has been impoverished by the legal fees to litigate for opportunity to have an equal parental role. During this time he was also ordered to pay child support to a mother with a similar income, and has had to pay all expenses of the children during his placement periods. It is natural that David's anger is greater. How is justice served when a court punishes someone for something that is to a large extent is a result of the courts own actions, and by rewarding a parent that has failed to fully support the children's relationship with the other parent?

> *"If there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.."*
> ***Dunn v. Blumstein*, 405 US 330, 342-43(1972)**

If the mother had supported David's equal role the court would most likely have ruled that an equal placement schedule was in the best interest of the child. The trial court could have supported David's request for equal placement throughout the entire year even if the mother opposed it. The court could have supported the recommendations of the guardian ad litem and Family Court Counseling to also allow David to also care for the children on Thursday nights(A25). The court chose to limit David's placement during every other Monday to Friday without any compelling reason. Such broad and arbitrary discretion fails to satisfy the minimum requirements for non-arbitrary treatment of David's fundamental rights to raise his children without unnecessary governmental intrusion. ***Bush v. Gore* 531 U.S. 98, 109 2000**,

There was no compelling state interest in treating the mother's and father's right to care for their children during equal periods of placement differently.

There was no compelling state interest in treating a father's right to care for his children differently that other similarly situated fathers, based only on the arbitrary discretion of the Judge.

There was no compelling reason to apply "a best interest of the child standard" before a state can intrude into fundamental right to raise his children, of a father in a divorced family, while a similar father's role in an intact family can only be by invaded by a showing of substantial harm.

There was no compelling reason to treat the children's right to spend equal time with each parent in this divorced family differently than that of similar children in an intact family.

The trial court in this case gave no weight whatsoever to the holdings of this court, which David presented into the record of this case in the October 28, 2002 brief.

Since the Appellate court ruled that David had not met the burden of proof to find Wisconsin's placement statutes unconstitutional, the Appellate court gave no weight whatsoever to the holdings of this court in determining if the trial court had properly applied it's discretion to the circumstances in this case.

iii. Wisconsin statutes, that allow the state to intrude into a family without first requiring some threshold determination that a parent is unfit or that maximizing placement with each parent may be harmful to the child, are unconstitutional.

Wisconsin is one of only a few states that require a trial court to appoint a guardian ad litem to represent the best interest of the child, only because one parent does not want the other parent to be fully involved in the raising of the child. No other reason is needed. Statues then require the court to order the parents to pay for the services of the guardian at litem and any professional services the guardian may request. Each parent is expected to pay for an attorney to represent them to litigate the issue of what is in the best interest of the child. Additionally Wisconsin statutes allow the trial court to order a parent that merely wants to assume an equal role in the children's lives to pay the attorney fees of the parent that is trying to obstruct this fundamental responsibility and right.

In cases such as this, where both parents are fit, live in the same community but one parent merely does not want the other

parent fully involved in the raising of the children without any compelling reason, such a scheme is unconstitutional. It unnecessarily burden's the constitutionally protected parental right of the parent who's role is not being fully supported, since it fails to require at least a threshold hearing as to whether there are any geographic or accommodations circumstances that would make equal placement impractical or that such placement may be harmful to the child.

A fit parent that wishes to merely exercise his or her fundamental right to care for the children during equal periods of time is forced to incur great expenses for an unjustified intrusion into his or her family, is forced to endure delays in securing this responsibility, and is forced into an adversarial relationship with the other parent which damages the ability of the parents to cooperate for the benefit of the children.

This court has previously acknowledged a concern for the cost of such litigation and how this further impinges on the fundamental rights of the parents:

> *"The burden of litigating a domestic relations proceeding can itself be "so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated."* *Troxel* 530 U.S. 57, 75 (2000)

Wisconsin's statutory scheme for resolving child placement disputes between two fit parents should be no less constitutionally offensive than if a state required a citizen, that merely wanted to exercise his fundamental right to vote, to travel 150 miles to a voting location, require him to pay a state approved chauffeur $200 per hour to individually drive him to and from that location, and then have a judge interview the person to decide whether it is in the best interest of the state for that citizen to be allowed to vote.

Wis. Stat. 767.045(1)(a) 2, 767.045(4), the second sentence of 767.24(4)(a), 767.24(5), and 767.325 (1)(b), are

unconstitutional because they allow the state an excessively broad opportunity to intrude into the private realm of the family without first requiring a preliminary determination as to the unfitness of a parent or that a parent's placement proposal which maximizes placement of the child with both parents may be harmful to the children. These statutes allow a mediator, placement study evaluator, guardian ad litem or judge to be guided by vague and arbitrary *"the best interest of the child"* criteria and have no safeguards that a mediator, placement study evaluator, guardian ad litem or judge must strive first and foremost to equally support the fundamental rights of both parents. Thus they allow an unconstitutional intrusion into the family.

Furthermore, since Wis Stat. 767.325 (1)(b) provides unnecessary and irrational legal obstacles which preclude many fit parents from fully exercising this fundamental right, without any compelling state purpose, this provision is also unconstitutional.

There are numerous factors in 767.24(5)(A), that a mediator, guardian ad litem or court may consider in determining what is "in the best interest of the child" in resolving a child custody and placement conflict between two parents. However, as noted by this court in *Troxel* , the Washington State Supreme Court found the states's third party visitation statutes, which allow the court to award custody to third parties based solely on what the court determines is "in the best interest of the child", to be unconstitutional. This court let stand the Washington Court's ruling that ***"the Constitution permits a State to interfere with the right of parents to rear their own children only to prevent harm or potential harm to a child."***

While "the best interest of the child" is a well-meaning legal concept in theory, the criteria set forth in 767.24(5) is so broad and vague as to be susceptible to arbitrary interpretation by a mediator, guardian ad litem, psychologist or a court thereby

yielding significantly different results and constituting a convenient disguise for discrimination based on gender of the parent or to impose the court's personal values over that of the parents.

In *Troxel*, the grandparents wanted placement every other weekend. The mother asked the court to order placement with the grandparents one day a month. The trial court ordered placement with the grandparents one weekend a month. This court ruled, that **the compromise placement schedule** ordered by the trial court **was an "*unconstitutional infringement*"** of the parent's fundamental right to decide what is in the best interest of the child. A court order which denies a fit parent equal periods of placement of their children against his or her will, based on merely what a court finds is in the best interest of the children, also fails to meet the heightened protection against government interference and is an unconstitutional infringement on that parent's right to due process and equal protection.

Like "*the intent of the voter*"in *Bush v. Gore*, " *the best interest of the child*" does not satisfy the minimum requirement for non-arbitrary treatment of parents necessary to secure the equal fundamental rights of both parents. This arbitrary treatment may further vary from judge to judge, county to county and based on the ability of each parent to afford and get effective legal representation.

While in this case, the Appellate court correctly found that both parents have an equal fundamental right to raise their children, the court's conclusion is flawed for the following reasons.

The Appellate court erred by giving the overly broad and older Supreme Court on New Hampshire finding in *LeClair v. LeClair*, 137 N.H. 213, 624 A.2d 1350 (1993) greater weight than the more recent holding of the highest court of the land in a case that more narrowly addressed a State Court's

responsibility to support the fundament rights to decide issues of child placement.

The Supreme Court on New Hampshire finding in *LeClaire* was related to a public policy allowing courts to order parents to pay child support for children attending college which was not related to any similar laws passed by the Wisconsin legislature and had nothing to do with a placement disputes between two fit parents.

This finding was subsequently and specifically rejected by the Supreme Court of Pennsylvania in *Curtis v. Kline*, 542 Pa. 249, 666 A.2d 265 (1995). The Pennsylvania Supreme Court referencing the same *LeClair decision* cited by the Appellate court in this case found no compelling or even a rational reason for such a public policy.

> *[38]. The New Hampshire Supreme Court concluded that because of the unique problems of divorced families, the legislature could rationally conclude that absent judicial involvement, children of divorced families may be less likely than children of intact families to receive postsecondary educational support from both parents.*
>
> *[39] With all due respect to our sister state, we must reject the New Hampshire Supreme Court's analysis in LeClair. The discriminatory classification adopted by our legislature is not focused on the parents but rather the children. The question is whether similarly situated young adults, i.e. those in need of financial assistance, may be treated differently.*
>
> *[40] Ultimately, we can conceive of no rational reason why those similarly situated with respect to needing funds for college education, should be treated unequally.*

Since the issue in this case implicates fundamental rights and requires strict scrutiny, the Appellate court erred by imposing on David a heavy burden to find that statutes as applied to the circumstances of his case and that implicates fundamental rights are unconstitutional. If statutes implicate fundamental rights, they are presumed unconstitutional and the burden to justify a compelling state interest rest on the State.

> *"If a law "impinges upon a fundamental right explicitly or implicitly secured by the Constitution it is presumptively unconstitutional"* . *Harris v McRea* 448 US 297, 312 (1980).
>
> *Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. City of Boerne v. Flores* 521 U.S. 507, 534(1997)

The appellate court failed to show how the statutes, that obstruct and deny fit parents an equal role in the raising of their own children secures any compelling state interest, especially since the Wisconsin Legislature in 1999 Wisconsin Act 9, in the strongest words possible directed the courts to maximize the amount of time the children spend with each parent.

B. Review is warranted because Wisconsin Courts have failed to enforce recent legislative changes and national public policy that harmonized Wisconsin statutes with the principles of equal protection of fundamental rights of both parents .

The Wisconsin legislature has already clarified the public policy of the state and has partially modified Wisconsin's child placement statutes to harmonize them with the principles of equal protection of the fundamental rights of both parents.

In **1987 Wisconsin Act 355.** The legislature makes a very clear statement of public policy:

> *"The legislature declares that it is the public policy of this state that unless there is a specific reason to the contrary it is in the best interest of a minor child to have frequent association and a continuing relationship with both parents."* published notes of section 1 of this act.

In section 34 of this act the legislature added a harm standard to assure children placement with both parents. 767.24(4)(b),

> *"A child is entitled to periods of physical placement with both parents unless, after a hearing, the court finds that physical placement with a parent would endanger the child's physical, mental or emotional health."* (A39)

In **1999 Wisconsin Act 9**, the legislature and Governor made further changes by adding the requirements that parents express their plans for raising their children in parenting plans 767.24(1m) (A37-39), established a presumption of joint custody and added the provision to clarify how much placement children should have with each parent in 767.24(4)(a)2.:

> ***"The court shall set a placement schedule*** *that allows the child to have regularly occurring, meaningful periods of physical placement with each parent and* ***that maximizes the amount of time the child may spend with each parent,*** *taking into account geographic separation and accommodations for different households."* (A39)

Maximizing placement with each parent is a very specific quantitative criteria, that in cases such as this can only be achieved by an equal placement order. This criteria is conditional only on geographic considerations and the

accommodations of the parents to assume placement of the children, not on what a guardian ad litem or court may feel is in the best interest of the children.

Equal placement of the children with both parents, in cases where both are fit, willing and able to assume this responsibility, and that live in the same community is not in conflict with the best interest of the child criteria. It secures the best interest of the child since it fully supports the presumption *"that a fit parent will act in the best interest of his or her child"*, which was affirmed by *Troxel*. It is also the only order, in cases such as this, that will satisfy the court's responsibility to enforce the latest requirement of 767.24(4)(a)2, to maximizing placement with each parent.

This Act was clearly intended to give parents a greater role in the process of establishing placement orders and, established a non-discretionary quantitative criteria that requires courts to fully and equally support the fundamental rights of both parents to care for their children by maximizing placement periods with each parent.

Furthermore in his 2003 Father's Day Proclamation President George W. Bush, stated,

> *"The time and attention that a father gives to a child is irreplaceable – there is no substitute for the involvement and commitment of a responsible father. Not only are fathers essential to the healthy development of children, they also influence the strength of families and the stability of communities. For this reason, our Government is working to help fathers succeed in this challenging, but life-affirming role."*

Harmonizing these most recent legislative and administrative citations of public policy suggest that Wisconsin's public policy is to **maximize** the involvement of both mothers and fathers in the raising of children in all

families. It should be evident that the Wisconsin legislature and Governor, with 1999 Wisconsin ACT 9, attempted to harmonize Wisconsin's statutory requirements with the principles of equal protection of fundamental rights of both parents.

Despite these changes, the older Wisconsin statutes cited in this petition still require the mandatory appointment of the guardian ad litem to represent the best interest of the child, and give the courts the authority to decide cases on what the court believes is in the best interest of the child.

As this case demonstrates, Wisconsin attorneys, guardians ad litem, and state courts have failed to apply the newly enacted statutes, consistent with the rulings by this court and the 14th amendment, as discussed earlier in this petition. They appear to be unwilling to accept these newer legislative directives or have placed the economic best interest of the divorce industry ahead of those of the children and families.

To further require fit parents like David, who have limited resources and who merely want to fully support their children emotionally as well as financially, to undertake the monumental challenge of working with the State legislature to further rectify flaws with state statutes, would further impose a burden on parents that this court in *Dunn v. Blumstein* has found is unjustified.

Since the State courts have failed to harmonize these newer statutes with the ruling of this court and the protections of fundamental rights guaranteed by the 14th amendment, it is within this court's authority and responsibility to address this issue.

C. Review is warranted because each year hundred of thousand's children and parents in non-intact families, are being harmed by the unnecessary and unjustified intrusion of family courts in Wisconsin and other states.

The Appellate court decision in this case, allows overly broad discretion to state courts to intrude into all divorce and paternity cases to determine the allocation of placement of children with each parent, without any compelling reason and merely because one parent wants to minimize the parental role of the other. No other threshold is required.

Parents like David are merely asking the state courts to support equally the fundamental right to both parents. They are not inviting the State to micro-manage their parental relationship or to compete with a fit parent's determination of how best he or she can fulfill his or her equal responsibility to secure the best interest of the children.

Rather than equally supporting the role of both fit parents, existing Wisconsin statutes allow one parent to use the family courts to minimize the role of the other parent. It requires the trial court to appoint a guardian ad litem and requires the court to order the parents to pay for the services of this attorney and any expert witnesses, along with fees for attorneys to represent each party. It places parents into an adversarial relationship in a legal battle for a favorable determination of the broad and vague question "what is best interest of the child?", by the trial court.

Court commissioners and judges have so much discretion in these matters that the outcome usually is unpredictable. The statutory scheme affirmed by the Appellate court for resolving child placement conflicts is unnecessarily, expensive, intrusive, and inefficient. Every time a court acts to diminish the role of a fit parent against his or her wishes, the anger level of the parent is likely to escalate, communication between the parents becomes more strained, and the environment for raising children is damaged. Each step of the way the parents are forced to spend money for legal expenses that they need for the children. After a few years of this conflict escalating, some parents that do not have the emotional or financial strength are forced to give up the fight and abandon their children or forced

to accept a "visitor" role in their children's lives. Some reach a point where he or she will react improperly by committing suicide or lashing out at the other parent. None of these outcomes are in the best interest of the children.

The existing statutory scheme affirmed by the Appellate court in this case, unnecessarily is damaging thousands of children and their parents in Wisconsin. Similar schemes in other states are further harming hundreds of thousand of children and their parents each year.

First and foremost, State laws regarding the family should act to serve the children and families. They should promote cooperation between parents, not provide incentives for litigation. They should not be concerned with preserving the ability of family law professionals to continue to provide their services at the expense of children, parents, and taxpayers.

Mediators, psychologists, guardians ad litem, court commissioners and judges do not love the children and don't have to live with the consequences of their recommendations or orders. While they serve a very important role in some cases, most placement disputes can be resolved more fairly and efficiently by a lesser involvement on their part.

It is the parents that know the children the best, that love the children and will have to live with the consequences of their decisions for the rest of their lives. A decision by this court, strongly supporting the equal fundamental rights of both parents, would act to assure both parents that their parental role will be equally supported in State Family Courts, unless there is clear and convincing evidence of harm or potential harm to the children. It would make clear that parents should focus on how to best co-parent their children, rather than trying to use Family Courts to obstruct their children's full and equal relationship with their other parent.

Courts should promote cooperation between the parents and allow families to use the significant amounts of money

currently being wasted to litigate this issue, for the benefit of their children. This will, by itself, help secure the best interest of the children.

A decision by this court to equally support the role of both parents to raise their children in these cases would establish a more uniform and predictable expectation that would allow children to have a full and equal relationship with both their parents, would greatly reduce the need for two fit parents to become adversaries to litigate this issue. It would reduce the emotional and economic damage to the children and their parents resulting from the current legal process which was affirmed by the appellate court in this case. It would also free up court resources for more pressing cases than a simple placement case where one fit parent is trying to minimize the role of another fit parent, without any compelling reason.

D. Review is warranted because this issue will recur, unless resolved by this court.

The equal treatment of fundamental rights and responsibilities of parents is a basic and simple principle that most parents can easily understand, even though the divorce industry has not yet been able to accept the simplicity and fairness of this principle. When parents are deprived of such a right or are forced to overcome major obstacles to secure this right, many will challenge the authority of the courts or statutes. This issue will continue to raised in state trial courts and federal district courts.

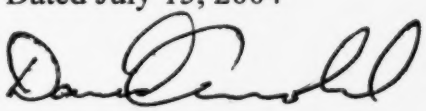
Appeals on this issue are currently pending in both state and federal courts in other cases. Even if the parents can not afford the cost of hiring attorneys to bring this issue before the courts, such as in this case, technology and the sharing of information possible through the internet will allow many parents to bring these issues before the courts on a pro-se basis.

If not resolved by this court this issue will recur, will continue to consume court resources and will continue to unnecessarily distract many good parents from their more important role of parenting their children.

CONCLUSION

For the forgoing reasons, the petitioner respectfully requests that the United States Supreme Court grant this petition.

Dated July 15, 2004



David Arnold Pro-se

PS. I have prepared this petition pro-se because I have no ability to pay legal fees to bring this petition before this court. I have, however, been offered pro-bono legal representation if the court grants this petition, by an attorney who has appeared before this court in the past and who I consider to be qualified to represent my position.

If this court grants this petition, I plan to accept this representation so this court can be assured of proper representation of the legal issues in this case in the brief and more importantly in the oral arguments in this case.

APPENDIX

APPENDIX

TABLE OF CONTENTS

Order of the Supreme Court of Wisconsin denying petition for review 4/20/04	A1
Order of the Court of Appeals 2/4/04	A2
Order of the trial court 5/7/03 (Record#28)	A8
Transcript of the trial court's findings and order 2/20/03 (Record#25)	A13
Motion, Affidavit and Brief of David Arnold 10/28/02 (Record#13)	A26
Related Wisconsin Statutes	A36
Picture of David Arnold and the three children whose relationship has been negatively impacted by the State court rulings in this case.	A43

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April 20, 2004

To:

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You are hereby notified that the Court has entered the following order:

No. 03-1547 Marriage of: Arnold L.C. #00FA000131

A petition for review pursuant to Wis. Stat. 808.10 having been filed on behalf of respondent-appellant-petitioner, David Arnold, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs. Abrahamson, C.J., dissents.

Cornelia G. Clark
Clerk of Supreme Court

****

COURT OF APPEALS
DECISION
DATED AND FILED
February 4, 2004
Cornelia G. Clark
Clerk of Court of Appeals

NOTICE
This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-1547 **Cir. Ct. No. 00FA000131**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN RE THE MARRIAGE OF:

ARLENE ARNOLD,
PETITIONER-RESPONDENT,
V.
DAVID ARNOLD,
RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
RALPH M. RAMIREZ, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Nettesheim, JJ.

¶1 BROWN, J. David Arnold appeals from a custody and placement order. He was awarded placement of the children 102 days per year, not the 182.5 equal placement per year as he had requested. He wants equal placement and

Page 2

argues that WIS. STAT. § 767.24(4)(a) (2001-02)1 requires it, that recent case law saying otherwise is wrong or did not take into account a parent's constitutional right to equal participation in the raising of children, and that, on the facts here, there was no compelling reason to deny equal placement. We reject his arguments and affirm.

¶2 David acknowledges that the court in ***Keller v. Keller***, 2002 WI App 161, ¶¶1-2, 10, 256 Wis. 2d 401, 647 N.W.2d 426, reversed a trial court's determination construing WIS. STAT. § 767.24(4)(a) to give equal placement to both parents unless the best interests of the child indicated otherwise. We held that while there is a statutory presumption of legal custody, there is no provision establishing a presumption of joint placement. ***Keller***, 256 Wis. 2d 401, ¶¶ 12-13. We construed § 767.24(4)(a) to say that while the family court must provide placement to be regularly recurring and meaningful, this is not tantamount to a presumption of equal placement. ***Keller***, 256 Wis. 2d 401, ¶12.

¶3 David asserts that ***Keller*** is wrong. He notes that WIS. STAT. § 767.24(4)(a)2 says that the court shall set a placement schedule which *maximizes* the amount of time the child may spend with each parent taking into account geographic separation and accommodations for different households. He looks to a dictionary definition of "maximize," which defines the word as "greatest quantity or degree." He claims that the statute is a legislative determination that

Footnote 1 All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

the best interests of the child will be presumed to have been met when there is equal placement. He argues that ***Keller*** vetoes the statute.2

¶4 The Wisconsin Court of Appeals is not at liberty to overrule its own published decisions. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). We are therefore bound by ***Keller***.

¶5 Possibly in anticipation that we are bound by ***Keller*** as far as it relates to statutory interpretation, David argues that the ***Keller*** court did not consider the constitutional ramifications of its decision and implicitly argues that we are free to reconsider the issue in light of constitutional claims. We agree that we may do so since it was not an issue addressed in ***Keller***.

¶6 The gist of David's argument is that, assuming ***Keller*** correctly interpreted the statute, the statute is unconstitutional because it violates the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. He claims that the physical placement statutes violate due process because they deprive him of a fundamental liberty interest in equally participating in the raising of his children. According to David, this violates substantive due process.

¶7 Substantive due process protects fundamental rights and "bars, among other things, certain arbitrary government actions, regardless of the fairness of the procedures used to implement them." ***State v. Radke***, 2002 WI App 146,

Footnote 2 The day before we released this opinion, another court of appeals panel released ***Lofthus v. Lofthus***, 2004 WI 193101, No. 03-1754. ***Lofthus*** addresses similar issues and reaches a similar result. Both opinions are ordered published because while the appellants in the two cases challenge the same statute, they do so on different theories. We address only the arguments Arnold raises, while the ***Lofthus*** court addressed only those arguments raised by the parties in that case.

¶6, 256 Wis. 2d 448, 647 N.W. 2d 873, *aff'd*, 2003 WI 7, 259 Wis. 2d 13, 657 N.W. 2d 66. A statute that does not infringe a fundamental right will generally be constitutional if it is rationally related to a legitimate government interest. ***Id.***, ¶7.

¶8 David relies upon ***Troxel v. Granville***, 530 U.S. 57 (2000), to argue that he has this fundamental right to equal placement periods with his children. ***Troxel*** involved a statute providing paternal grandparents a right to child visitation that the United States Supreme Court held violated the mother's rights to raise her children. ***Id.*** at 68-75. In doing so, the Court reaffirmed that the liberties protected by the due process clause include "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." ***Id.*** at 66.

¶9 David asks us to declare that the Wisconsin physical placement statutes are unconstitutional under this broad principal. David has a heavy burden ahead of him. Pursuant to ***State v. Lindsey***, 203 Wis. 2d 423, 432, 554 N.W.2d 215 (Ct. App. 1996), our standard of review is as such:

> A statute is presumed to be constitutional and will be held unconstitutional only if it appears so beyond a reasonable doubt. The burden of establishing the unconstitutionality of a statute is on the person attacking it, who must overcome the strong presumption in favor of its validity. (Citations omitted.)

¶10 With our standard of review in place, we hold that David has not met his heavy burden. First, the facts of this case are distinguishable from those in ***Troxel***. A dispute between a parent and grandparents represents a far different dynamic than the dispute between two natural parents with equal rights after a divorce. The grandparents in ***Troxel*** simply did not have a fundamental right to the care and custody of the children as do

the parents here. So, when the ***Troxel***

Page 5

court was speaking of fundamental rights in the raising of children, it was speaking to the existing disparity between natural parents and grandparents.

¶11 Second, insofar as disputes between natural parents are concerned, while parents do have a natural right to care and custody of their children,2 this does not mean that parents have a "fundamental right" to "equal placement periods" after divorce. David has not demonstrated why, following a divorce between parents, the state does not have the right to arbitrate any dispute those parents may have over what happens to their children. *See* ***LeClair v. LeClair***, 624 A.2d 1350, 1357 (N.H. 1993) ("The legislature contemplated the need to have ... heightened judicial control over divorced families because of unique problems that exist in a home that is split by divorce."). We conclude that David has not met his heavy burden to show why the state should be foreclosed from allowing its courts to set placement schedules commensurate with the best interests of the children even if it means less than equal placement. His substantive due process argument fails.

¶12 The substantive due process discussion provides us with a nice transition to David's final argument on appeal that the family court misused its discretion when it did not give him the equal placement he demanded. We must remember that Wisconsin has given its courts the *responsibility* to arbitrate disputes involving custody and arrive at a solution which, in the courts exercise of discretion, is in the children's best interests. This is exactly what the family court did in this instance. The family court began its decision by acknowledging: "I see two parents who are absolutely, totally in love with their children, as it should be, and absolutely want to do the best that they can for those children." But the court

Footnote 2 *See* ***Barstad v. Frazier***, 118 Wis. 2d 549, 556-57, 348 N.W.2d 479 (1984).

Page 6

noted the "hate" the parties had for each other and opined that the underlying animosity "totally clouds their decision-making process in regards to their children." The court said it was laden with the responsibility of determining the "fitness of each of the parents … in terms of placement." While the court wished it could fashion a schedule that would avoid the parents from interacting with each other and from exposing the "hate, the animosity and the anger apparent, which is just going to … sour … [or] rub off on the children," it was wishful thinking. The court said the possibility of the parents working together just was not going to happen.

¶13 Then, the court pointed out specific situations where the parents' animosity toward each other poisoned the atmosphere. The court noted that the children attend private religious schools. The court was truly pained by the idea that it had to limit one parent's involvement in these religious-academic activities, but found that Arlene Arnold was better able to put aside that hate and work in the children's best interests than David. The court specifically found that David's inability to put it aside affected his parental decision-making skills. The court likened David's problem in this regard to "extreme emotional baggage." The court therefore concluded that under the circumstances, one parent had to make these decisions. The court found that David's "difficulty in dealing with the educational persons, the daycare people [and] the school people," led to the conclusion that the one person chosen to make the key decisions be Arlene. The family court thus fashioned a parental placement schedule that would benefit Arlene's decision-making duties. Fittingly, because these duties began with and ended with the school year, the court did order equal placement during the nonschool summer months.

Page 7

¶14 The decision of the family court represents a properly reasoned exercise of discretion based on the facts of record. David's arguments to the contrary are not availing.

By the Court.—Order affirmed.

STATE OF WISCONSIN: CIRCUIT COURT:
WAUKESHA COUNTY: FAMILY COURT BRANCH:

IN RE THE MARRIAGE OF: (Record# 28)

REVISED

ARLENE ARNOLD, ORDER AMENDING JUDGEMENT OF

Petitioner DIVORCE REGARDING CUSTODY AND PLACEMENT

and Code No. 40601

DAVID ARNOLD, Case No. 00-FA-000131

Respondent

The above matter having come on for hearing on February 20, 2003, the Honorable Ralph M. Ramirez, presiding, and the appearances being as follows:

Petitioner, Arlene Arnold, in person and with counsel, LADD, MILAEGER & WIMMER, LLP, by Andrew C. Ladd;

Respondent, David Arnold, in person, pro se;

Attorney Joseph G. Alioto appeared as Guardian ad Litem for the parties minor children; and,

Ms. Theresa Kelly, Social Worker, appeared on behalf of Family Court Counseling Services.

NOW THEREFORE, based upon the testimony of the parties and on all the records and proceedings heretofore had and taken herein, the Court makes the following Orders, to be effective commencing February 20, 2003:

1. That a transcript of the proceedings held in this matter on February 20, 2003 is attached as the Findings of the Court

herein and made a part hereof marked as Exhibit "A".

2. That both parties continue to have joint legal custody of all three minor children, Jourdan Mae Arnold d.o.b. 1/12/93, Jacob August-John Arnold d.o.b. 8/4/96, and Hannah Ann Arnold d.o.b. 1/16/98.

3. That petitioner has the final decision-making power concerning all educational, non-emergency medical, and non-emergency dental issues, as well as, mental health issues for the minor children.

4. That the parties shall alternate placement of the children during the summertime on a weekly basis, commencing on Monday of the first full week after the children finish school for the summer, and terminated the week before the first day school commences in fall.

5. That placement during the school-year shall be as follows:

A. Father shall have placement every other weekend from Friday at the commencement of day care or school until the commencement of day care or school on Monday. If there is no school on Monday, and Father takes off work on that day, he shall have the children until 4:00 p.m. when Mother is done with work on that Monday.

B. Father shall have access to the school and day care programs, and is able to participate in those programs or day care events on his Fridays, and only on his Fridays.

C. During the school year, the parties shall drop off and pick up the children at school. There shall be no contact between the parties at school. In other words, Mother shall drop off the children at school on Friday morning, and Father shall drop off the children at school on Monday mornings. Mother shall pick up the children from school on the Mondays following Father's weeks.

D. During non-school hours or times the parties shall continue to exchange the children at the McDonald's restaurant on Moorland Road near Brookfield Square.

6. That both parties shall be responsible to provide clothing

for the children during their parenting time.

7. That each parent shall be responsible during their periods of placement to ensure that the children's homework is complete, and that they are ready for school the following day.

8. That the children shall have unlimited ability to telephone the off-duty parent while they are placed with the other parent.

9. That volunteer time at school or at the day care or child care provider shall be only during the parent's time of placement.

10. That either party may request participation in a field trip or other special school program. The request must be in writing, and can only occur by mutual agreement of the parties.

11. That the parties are not limited in their attendance of after-school functions, however, they are ordered not to engage in any negative behavior towards each other.

12. That the Court further orders that the children shall be able to attend special family events, including, but not limited to, family reunions, weddings, funerals, baptisms, and other religious activities. The parent that requests the children for such events must advise the other with at least 2 weeks' advance written notice, with the obvious exception of funerals. The special event shall be no longer than one day or one 24-hour period, unless it is out-of-state, and then it shall be for no longer than three (3) calendar days.

13. That neither party is allowed to make any disparaging remarks against the other while they are the parent on duty, nor during the attendance of any school, extra-curricular activity or church function.

14. That the children shall attend the church with the parent for whom they are with that weekend. In the event that it is necessary that both parents attend the same church for a religious activity that may conflict with the other parent's placement, the children shall sit with the parent who is on duty that weekend. The other parent must sit separate and not interfere with the parent on duty in any way, shape or manner.

15. That it is further ordered that respondent continue to engage in counseling with Michelle Anderson, and provide the Court with a written report and confirmation regarding his counseling with Michelle Anderson.

16. That the parents are further ordered to engage in communication counseling with Carol Palmert, and continue with said counseling until such time that Carol Palmert believes the counseling is no longer helpful.

17. That respondent is hereby ordered to respect the school and day care officials and work with them in the best interests of the children.

18. That both parents shall attend "Parenting with Love and Logic" classes.

19. That petitioner is ordered to provide photocopies of all documents, reports, permission slips, schedules, calendars, and anything that pertains to the children's day-to-day activities, education, medication, dental care, medical care, mental health treatment or counseling, etc., to respondent as soon as practicable after a particular event has occurred.

20. That with regard to the holiday schedule, petitioner shall have the children for spring break this year. Placement during spring break shall follow along the lines of the regular visitation schedule. The winter break shall be split, dividing the days equally with consideration given to the specific holiday schedules for Christmas and New Year's, with petitioner having the first part of the holiday and respondent having the second part of the break. That the holiday placement schedule prepared jointly by the parties is attached hereto and made a part hereof, marked as Exhibit B, and is so ordered by the Court.

21. That Attorney Joseph Alioto's role as Guardian ad Litem is terminated, forthwith.

22. That any and all other terms and provisions of the Judgment of Divorce and subsequent Orders, not herein amended, shall remain in full force and effect until further order of the Court.

Dated this 7th day of May, 2003.

signed over objection of Mr. Arnold

BY THE COURT:
s/Ralph E. Ramirez
Honorable Ralph E. Ramirez,
Circuit Court Judge

DRAFTED BY:
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State Bar No. 1014673
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STATE OF WISCONSIN CIRCUIT COURT
WAUKESHA COUNTY FAMILY COURT
BRANCH

(Record# 25)

In re the Marriage of:
ARLENE ARNOLD, Case No. 00-FA-0131
Petitioner,
and
DAVID ARNOLD,
Respondent. COURT TRIAL Day 2 of 3
(Excerpt-Judge's Order)

February 20, 2003 Honorable Ralph M. Ramirez,
Circuit Court Judge,
Branch III, presiding

APPEARANCES:

ANDREW LADD, Attorney at Law, appeared with and on behalf of the Petitioner.

DAVID ARNOLD, Respondent, appeared in person, pro se;

JOSEPH ALIOTO, Attorney at Law, appeared as Guardian ad Litem.

THERESA KELLY, Social Worker, appeared on behalf of Family Court Counseling Services.

****

Sandra K. Tripp, RMR-CRR
Official Court Reporter
Branch III

TRANSCRIPT OF PROCEEDINGS

THE COURT: All right. The difficulty in this case and the difficulty in deciding what should happen with these children is that I see two parents who are absolutely, totally in love with their children, as it should be, and absolutely want to do the best that they can for those children.

I've heard the testimony of each of the respective parties and of the professionals, Miss Kelly and the information that she used in support of her decision, not as substantive evidence, but the reasons in support of her recommendation to the Court. I've heard the statements and arguments of counsel, and as I said, the testimony of each of the respective parties.

I've heard the testimony of Mr. Birra. That was important to the Court. And what strikes me is not just the amount of love and concern that these two people have, Mr. David Arnold and Miss Arlene Arnold have for their children, but the stark contrast of the animosity, indeed the hate, that they probably have for each other and the fact that that animosity absolutely and totally clouds their decision-making process in regards to their children.

END OF PAGE 1

I don't know whether they realize what's going on here, but to have the Court make these decisions and be requested to be so rigid in its decision-making as to when the parties can see their children or be with their children or interact with their children, I feel if – as if I'm asked to make decisions about baseball trading cards or set visiting hours at the zoo, when the fact of the matter is I'm talking about three beautiful children. I – I've looked at Exhibits 11, 12 and 13, and they — they're wonderful children.

They are – as a parent myself, I'm especially cognizant of the joy that children bring us, the concern that parents have for the children, and that is very much apparent, and that's important here, because I have to determine, as I'm asked to make decisions about custody and placement, I have to determine the fitness of each of the parents in terms of making decisions about the children's lives for custody purposes and the fitness for them in terms of placement.

This is, unfortunately, the – very unfortunately, a typical situation where I see the parents consumed with anger, perhaps at each other, and hate, animosity, and it consumes them, that I

END OF PAGE 3

see that it at times – not so much now for MS. Arnold, a great deal less for Miss Arnold, but I see that it's been more important to press each other's buttons than to care for their children. And it causes me grave concern in that respect.

Nobody's without sin here. Maybe some have less sin at this time. Maybe, probably, based on the testimony I've heard, Mr. Arnold has done less to get by that anger, to get past the anger that he has and animosity against his ex-wife. Maybe he's done less, maybe he simply hasn't been able to get by that. For whatever reason there may be, that is putting his relationship with his children in peril.

The court is very cognizant of the standards that I have to consider in making a decision about placement for children. The Court must maximize the amount of time that each respective parent has with the children. That doesn't mean that I have to give them fifty-fifty time where there's two parents. I wish that I could make a decision where I'd be able to give the children all the time to one parent or the other so that they could not have to interact with the other parent, so that there wouldn't be the hate, the animosity and the anger apparent, which is just going to spoil these children. And I don't

END OF PAGE 4

mean spoil in the sense of giving them too much. It's going to turn them sour. The animosity of the parents is going to rub off on the children, there's no doubt about that in this Court's mind, if it hasn't already happened

I hear about Jordan especially, who has had some poor grades in the past, and has fortunately been able to improve. Jacob, who's been able to improve as well in some areas. Why do you think they've been doing poorly in the past? These are intelligent children. They're the children of two intelligent people. As I understand, both of you are engineers and are well educated. There's a reason that you have to look at what's going on and why there are problems.

So in making my decision today, the standards I consider are maximizing the placement of the children with each parent. Other issues under 767.24 pertaining to custody and physical placement, I consider the employment, where the children go to school, the ability to make decisions for medical purpose – purposes, education purposes, religious commitment of the children, the ability for the children to contact the other parent when placed with one parent, whether – when placed with a

END OF PAGE 5

father, the ability to contact the mother and be placed with the mother, the ability to contact the father when placed, the question of whether both parents are capable of performing the parental duties that they have and fulfilling the responsibilities that they have in raising their children, the ability of the parties to work together in the best interests of the children

That's not in any way the least important in this case. I am gravely concerned about the ability of the parties to work together in the best interests of the children. In fact, I think the testimony is very clear that there's a total lack of ability for the parties to work in the best interests of the children together. I simply don't see that happening. I can't split these children in half. I can't give one and a half to each of the respective parties and let them go about their way. It's not going to work. The children love both parents, it's apparent to me. The parents love all of their children.

I'm concerned in a number of -- for a number of reasons. I know the children are sent to private religious schools. I see the inability of the parents to communicate at work with each other as

END OF PAGE 6

an impediment. Participation in your child's religious upbringing and academic upbringing are important in any place, in any school setting, but especially so in a – a private school where those schools rely on the support of the parents. And it truly, truly disturbs me that I'm asked to limit one parent's involvement in the school setting, because it's not just bad for the parent, it's bad for the children, it's bad for the school that they've chosen to go to as well.

That having been said, considering the following testimony. Mr. And Ms. Arnold cannot communicate with each other, that they cannot work with each other, they cannot tolerate each other, they have an overwhelming dislike for each other, in terms of weighing what that means and the level of that dislike, I don't have any reason to believe that it's any less intense on either side. And I consider the testimony and the way it was delivered by each of the respective parties.

However, I'm going to find for purposes of today's hearing, that sufficient credible evidence has ben presented to the Court to believe that Ms. Arelene Arnold has been able to, by whatever means or by whatever method, or by whatever

END OF PAGE 7

treatment or counseling she's received, been able to put aside some of that hate and to be able to better work in the best interests of the children.

I'll find that testimony, credible testimony has been received that there's no reason to believe that Mr. Arnold isn't going to work in the best interests of his children. That he – I shouldn't say he isn't willing to work, in the best interests of his children – that he's not able to make decisions in the best interests of the children, that he isn't able to exercise appropriate custody or decision-making over the child – children, but for the fact that he cannot work with Miss Arlene Arnold, and for that reason, there has to be some modification in regards to the decision-making and the custody of the children.

I'm not going to change joint legal custody. I'm going to find that both parents are fit and proper persons to make decisions about the children. But because of the communication problems, the extreme emotional baggage, I think one of the more modern terms that people use these days that exist between the parents, one parent has to be able to make certain decisions.

And although allowing for the continuation

END OF PAGE 8

joint legal custody, I will provide – I will grant final decision-making process, the right to make final decisions as to educational issues and non-emergency medical and dental issues to Miss Arlene Arnold. Now, I do that because I think there's sufficient credible evidence for me to believe that Mr. Arnold still has difficulty in dealing with the educational persons, the daycare people, the school people, and that therefore, for that reason and for the other reasons I have set out on the record, Miss Arnold is better able to make those decisions

obviously, when there's -- when the children are with Mr. Arnold, he certainly has the ability to make emergency medical decisions or dental decisions. From time to time kids, you have to make dental decisions on a quick basis for children. So there's no – I hope I don't have to modify this any more than that. That's what's recommended. I believe that's what's necessary and appropriate in regards to the situation.

Also, I will find that it's appropriate for Ms. Arnold to have the final decision-making power in regards to mental health issues for the children. That means treatment, counseling for mental health

END OF PAGE 9

issues and social issues as well. And I think that constitutes every necessary thing for purposes of providing the children for treatment. I don't want to have to make that decision in the future. I don't know these children. And I know that Mr. Alioto has probably spent a fair amount of time knowing and learning about the children, but the parents have to assume responsibility, so it's going to be up to Miss Arlene Arnold to make those decisions. It has to be one of the parents.

The issues of custody as well, I think have – I think custody's been resolved. I don't think that there's anything that I've missed on that, and I'll make inquiry of the parties later in that respect.

In terms of placement of the children, I'm so truly saddened by the fact that I have to structure placement to the degree that it would inhibit the contact between the parents. What I'm going to do is as follows: As I have said, both Mr. Arnold and Ms. Arnold are fit and proper persons to parent these children, and there's no indication whatsoever that the children are in any danger of any harm with either of the parents. There's no – nothing that convinces me of that. Is there some testimony that Mr. Arnold may be a little bit more neglectful in

END OF PAGE 10

terms of medical concerns for the children? Yes, there is, but nothing to the extent that it would lead me to believe that he cannot provide for the children and take care of them while the children are place with him.

I'm concerned about the best interests of the children. I'm not concerned about who's going to get off better here. I'm not concerned with who's going to have more minutes or hours with the children. I am concerned about the best interests of the children. And considering the statutory criteria that I have and the statutory charge to maximize the amount of time, what I'm going to do is, for the most part, for the most part, follow the recommendation that I've received from the guardian ad litem, in the following respect:

In terms of the summertime, I'm going to allow equal shared placement on alternating weeks. I am, as set out in Miss Kelly's report, of the belief that the children are certainly emotionally attached to both parents and that it would be in their best interests. That's during the summertime. I do not know when summer starts, so summer placement is to commence the alternating weeks the week – the first full week after the children finish school for the

END OF PAGE 11

summer. So whether they finish school on a Monday or a Friday is of no import to me. The alternating placement is to commence on the first full week after the week in which summer vacation begins for the children.

MR. ALIOTO: On Monday, Judge? I'm sorry.

THE COURT: On Monday.

MR. ALIOTO: Thank you.

THE COURT: In terms of the termination of the alternating summer placement, again, I don't know when that commences, and because of the alternating nature, I have some problems determining when that's going to take place, so it's to terminate a week before the first day of school commences. So, again, again, I don't know when that might be. That might be the day after Labor Day for the school that the children go to. It might be the – some days, the Thursday, Friday or Wednesday, whenever the week before. But the alternating placement is to terminate the week before the firsts day of school commences. I don't have a calendar in front of me, nobody's told me when those days occur at this time, so I can't – I think I almost need to do that. And I'm going to require that the guardian ad litem set that schedule out in writing for the

END OF PAGE 12

parties.

I will indicate that in terms of what's going on in the school year, the request of the guardian ad litem and the recommendation of Family Court Counseling is that it occur on a every-other-week basis, with placement Thursday night until Friday morning with the father every other week and then Friday through Monday with the father every other week.

I'll do the following: Indicate that placement shall be every other weekend with the father in the following manner: And, again, I haven't heard any testimony about what time daycare commences or what time school starts, so I can only give a characterization of the time. So father shall have placement of the children from the commencement of daycare or school on Friday until the commencement of daycare or school on Monday. If during that placement schedule there's no school on Monday, not if Mr. Arnold takes off of work, but if there's no school schedule on the Monday contiguous to his placement, he is to have the children until – again, I don't know what time Ms. Arnold's work finishes on Monday.

Mr. Ladd.

END OF PAGE 13

STATE OF WISCONSIN CIRCUIT COURT
WAUKESHA COUNTY FAMILY COURT BRANCH

In re the Marriage of:
ARLENE ARNOLD, (Record# 13)
Petitioner,
v. Case No. 00-FA-0131
DAVID ARNOLD,
Respondent.

NOTICE OF AND MOTION AND AFFIDAVIT TO MODIFY AN EXISTING ORDER

Please take notice that the above named respondent will appear before the Honorable Ralph M. Ramirez in Waukesha County as follows:

Date: November 5th 2002
Time: 2:30 P.M
Place: Room 370

The respondent, David Arnold, moves the Court, the honorable Ralph M. Ramirez , for an order of joint custody, equal periods of placement of the children, and for a child support order based on this placement order , as defined in the attached parenting plan, and an order requiring Arlene to pay for David's attorney fees and costs to bring this action.

This motion is brought pursuant to the court's January 2002 and August 12, 2002 order in this case, Wis Stats. 767.24, rulings of the United States Supreme Court, the Due Process and Equal Protection Clauses of the 14th amendment of the United States Constitution as described in the attached brief.

Respectfully submitted

this 28th day of October, 2002.

s/ David Arnold

Signature
Name: David Arnold
Address: 3535 N 97th Street
Milwaukee, WI 53222
Telephone # : 414.462.2737

AFFIDAVIT of David Arnold

David Arnold, being first duly sworn on oath, deposes and states to the court as follows:

1. The petitioner Arlene Arnold and the respondent David Arnold are the parents of three children Jourdan (DOB 1/12/93), Jacob(DOB 8/4/96), and Hannah(DOB 1/16/98). They were divorced in November 15 , 2001.

2. The current order signed by, Judge Becker on January, 2002 provides for joint custody and placement with the David on alternating weekends from Friday (after school or 5:30Pm) until Monday the beginning of school alternating Mondays and Thursday from after school until beginning of school the morning during the school year, and alternating weeks during the summer and alternating Holidays. The court order also included a provision to review this placement schedule after six months, Findings of Fact Conclusion of Law, and Judgement of Divorce paragraph 7(a),

The court will hold a review hearing in six (6) months. At that hearing, either party may challenge the current placement arrangements under the " best interest of the children" standard pursuant to Sec. 767.325(1)(b), Wis Ststs.

3. The children attend Elm Grove Lutheran school at 945 Terrace Drive, Elm Grove. School normally starts at 8:30 and ends at 3:30 p.m.

4. At the time of the divorce Arlene resided in an apartment at W243 N2344 Saddle Brook Drive, Pewaukee. She currently resides with her parents in a 3 bedroom home at 5875

North Sugarbush Lane,Greendale . The children share the basement recreation room in her parents home when they are with Arlene. This is approximately 15 miles from the children's school. She is employed as an Engineer at DRS Technologies,4265 North 30th Street, Milwaukee, WI. Her office is approximately 16 miles from the children's school.

5. David currently resides in a 2 + bedroom home at 3535 N 97th Street, Milwaukee. This is approximately 6 miles from the children's school. Two children share one bedroom and the other sleeps in the 2nd bedroom when they are with David. David is employed as an Engineer at Rexam Sussex, N65 W24770 Main Street, Sussex, WI . His normal working hours are from 8:00 a.m. to 5:00 p.m. His office is approximately 13 miles from the children's school.

6. David's Parents live at N69 W13441 Harding Drive, Menomonee Falls approximately 5 miles from David's residence. They assist in the care and nurturing of the children from time to time during the school year and summer months.

7. The children also go to day care at Elm Grove Lutheran childcare at 945 Terrace Drive, Elm Grove, before and after school from7:00 am to 8:30am, and from 3:30 pm to 5:30 pm. The day care facility takes them to, and picks them up from school.

8. David currently pays to Arlene $900 per month as child support, and paying 50% of the children's day care expenses. Arlene maintains medical insurance and pays tuition costs. Out of pocket medical expenses are shared eqully David pays for all other expenses when the childrenare with him.

9. On August 12, 2002, in response to an affidavit filed by Arlene, the court scheduled a November 5th hearing to show cause why the current placement arrangement should not be modified.

10. The affidavit filed with the court by Arlene in August 2002 cites numerous trivial incidents, which do not rise to the level of contempt or demonstrate that placement of the children is harmful to the children. This affidavit, however does

demonstrate Arlene's ability to distort and over react to minor incidents and a need for change to the existing placement schedule. David agrees with Arlene that a change of placement is necessary to reduce the number of transitions of the children between David and Arlene. David however believes that having an equal placement schedule as outlined in his parenting plan would reduce the number of incidents similar to those noted by Arlene in her affidavit, and would be in the best interest of the children.

11. Both parents in this action have demonstrated a willingness to assume their full responsibility to raise their children. They are both fit, responsible and are the only parties who will live with the consequences of their decisions for the rest of their lives. Both live in the same community, have adequate accommodations for the children and are available to care for the children.

12. No compelling reason exists in this case for the Court to allow one parent, a guardian ad litem, a psychologist, placement study evaluator, a court commissioner or the court's own personal feelings to interference with the equal statutory and fundamental responsibility and right to care for the children of either parent.

13. On January 22, 2000 Arlene was arrested by the Menomonee Falls Police Department for Physically assaulting David. She was released when David did not file charges. In light of Arlene's capability for physical abuse, David believes that transitions of the children should continue at day care and at the Brookfield McDonalds or other mutually agree upon location. Additionally David believes, this should be part of the record of this case to discourage Arlene from physically assaulting David or the children.

14 The cost of litigating this issue will deprive money from both parents that they both need to take care of the children and believes protracted litigationof this issue is economically and emotionally harmful to the best interest of the childrenand both parents.David agrees that the parties have communication

problems, which are borne by both parties. The best interest of the children are served by joint custody and equal placement with both parties pursuant to the WI Stats. Continued litigation will take funds from both parties, jeopardizing sufficient funds to provide for the children in private education. If Arlene insists on using the legal system to obstruct David's fundamental right to equally participate in the raising of the children, the court should order Arlene to pay for all of David's expenses to litigate this issue, including David's fees for his attorney and the guardian ad litem.

s/ David Arnold

Notary seal
State of Wisconsin
Waukesha County
Subscribed and sworn to before me
this 28th day of October, 2002.
s/ Diane L Koch
Notary Public Waukesha County, WI
My commission expires 3-7-04.

STATE OF WISCONSIN CIRCUIT COURT
WAUKESHA COUNTY FAMILY COURT BRANCH

In re the Marriage of:
ARLENE ARNOLD,
Petitioner Case No. 00-FA-0131
v.
DAVID ARNOLD,
Respondent.

BRIEF IN SUPPORT OF MOTION REGARDING CHILD PLACEMENT AND SUPPORT

This brief is intended to provide the court with the legal basis to bring about a fair and efficient resolution of the child, placement and support issues in this case, without the need of lengthy and costly litigation of these issues.

1. Wis Stat. 767.24(b) establishes a child's and the corresponding parents' right to placement as *"A child is entitled to periods of physical placement with both parents"*. It also establishes a burden of proof before this right can be denied as *"unless, after a hearing, the court finds that physical placement with a parent would endanger the child's physical, mental or emotional health"*.

1999 Wisconsin Act 9 also added the provision in Wis Stat. 767.24(4)(a)

*"**THE COURT SHALL SET A PLACEMENT SCHEDULE** that allows the child to have regularly occurring, meaningful periods of physical placement with each parent and **THAT MAXIMIZES THE AMOUNT OF TIME THE CHILD MAY SPEND WITH EACH PARENT**, taking into account geographic separation and accommodations for different households."*

2. The court's responsibility to enforce these statutory provisions is defined in *Groh v Groh*, 110 Wis. 2d 117, 122, 327 N.W.2d 655,658 (1983).

"Where the legislature has set forth a plan or scheme as to the manner and limitations of the court's exercise of its jurisdiction, that expression of the legislative will must be carried out and power limitations adhered to."

3. United States Supreme Court in *Troxel v. Granville*, 530 U.S. 57, 65 (2000) , ruled.

" the interest of parents in the care, custody, and control of their children - is perhaps the oldest of the fundamental liberty interests recognized by this court."

"In light of this extensive precedent, it cannot now be doubted that the due process clause of the Fourteenth

Amendment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children." Id. at p.66

"*So long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the state to inject itself into the private realm of the family to further question the ability of that parent to make decisions concerning the rearing of that parent's children.*" Id. at p.68, 69

(there is a) "traditional presumption that a fit parent will act in the best interest of his or her child."Id. at p.68.

"*the Due Process Clause does not permit a state to infringe on the fundamental right of parents to make child-rearing decisions simply because a state judge believes a 'better' decision could be made.*" Id. at p.72, 73.

4.The court's authority and responsibility to equally support this statutory and fundamental right and responsibility is derived from the Fourteenth Amendment of the United States Constitution which simply states,

"*no State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*"

5.While *Troxel* involved a placement dispute between a parent and a grandparent, the United States Supreme Court made no distinction between mothers vs fathers, black parents vs white parents or parents in intact families vs non-intact families. Thus this decision is equally applicable in disputes between two fit parents. The due process and equal protection provisions of the 14th amendment of the United States Constitution protect the responsibilities and rights of all parents regardless of their gender, race or marital status.

6. Since a parent's ability to make personal choices regarding the care and nurture of his or her children is directly proportional to that parent's physical access to his or her children, the only way two parents living separately can equally exercise this statutory and fundamental responsibility and right is if each is afforded the same opportunity to assume equal

physical placement of his or her children. The court must therefore merely support each parents' decision as to what each parent believes to be in the best interest of the children in satisfying their responsibility and right to provide for their child during equal periods of placement. Absent a compelling reason, the court cannot allow one parent, a guardian ad litem, a psychologist, placement study evaluator, a court commissioner or the court's own personal feelings to obstruct the equal role of either parent to make this decision on behalf of the children.

7. The court's responsibility to equally support the fundamental rights of both parents is further established by Article VI, Clause 2 of the United States Constitution which points out:

"This constitution, and the laws of the United States ..... shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."

8. While the Wisconsin Court of Appeals ruled in *Keller v. Keller,* 647 N.W. 2d . 426 (2002), that there is no statutory presumption for equal placement, this decision did not address the court's responsibility, established by *Groh*, to enforce the statutory requirement (not presumption) in Wis. Stat. 767.24(4)(a) that *"The court shall set a placement schedule .... that maximizes the amount of time the child may spend with each parent."* The decision in *Keller* also did not address **the court's paramount responsibility**, established by Article VI, Clause 2 and the fourteenth amendment of the United States Constitution, and the United States Supreme Court ruling in *Troxel* , to equally support the fundamental rights of both parents to decide what is in their child's best interest. Since the issues noted in this brief were not addressed and resolved in *Keller*, the court is not bound by the holding in *Keller*.

9. Without first holding a hearing, and making a preliminary finding that there is some evidence to raise a concern that equal physical placement with a parent would endanger the child's physical, mental or emotional health for

the welfare of the child , the court may not allow an intrusion into this family by the appointment of a guardian ad litem or placement study or impose it's own personal feeling about what is the best interest of the child. The application of Wisconsin Statutes 767.045(1)(A)2, 767.045(4), 767.11(10), 767.11(14), second sentence of 767.24(4)(A), and 767.24(5), in such cases where the child and placement is merely contested, is unconstitutional. If there is no evidence to support a finding to raise a concern for the welfare of the child, the court must merely support each parents' fundamental right to decide what is in the child's best interest in satisfying their equal placement responsibility and may not burden the parents with the costs of a guardian ad litem or placement study.

10. The best interests of these children will be advanced by assuring each child an unobstructed relationship with both parents by establishing the equal importance of their mother and father in their upbringing and allowing both parents an equal opportunity to participate in the raising of the children. This will assure that the children receive the maximum emotional and financial support of both parents and will improve the likelihood of the children developing a strong and positive relationship with both parents.

11. Ordering equal placement of the children with both parents, that are both fit and willing to assume this responsibility, does not fail the court's responsibility to act in the best interest of the child. It secures the best interest of the child since it fully supports the presumption *"that a fit parent will act in the best interest of his or her child"*, which was affirmed by the United States Supreme Court in *Troxel*. It is also the only order that will satisfy the court's responsibility to enforce the latest requirement of 767.24(4)(a), and will most likely minimize future legal conflicts between the parents over this issue.

12. To exercise the fundamental right to make decisions regarding the child, each parent must have sufficient funds to provide for the children's economic needs during their

respective placement periods. Therefore the court should also assure that a child support order (if any) will allow both parents sufficient funds to provide for the children during each parent's placement period.

13. The United States Supreme Court decision in *Dunn v. Blumstein*, 405 US 330, 342-43(1972) noted:

"The State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with "precision," and *"If there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means."*

The *"substantial change of circumstances"* criteria to modify an existing order in Wis. Stat. 767.325 (1) *"unnecessarily burden or restrict constitutionally protected activity"* and obstructs many fit parents from exercising their full fundamental responsibility and right to participate in the upbringing of their children. It is therefore unconstitutional and should not be applied in this case.

14. The court's authority and responsibility to award fees in this case is found in:

42 USC 1983 provides for

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, **shall be liable to the party injured in an action at law**, suit in equity, or other proper proceeding for redress...

Wis Stat 767.262 Award of attorney fees.

(1) The court, after considering the financial resources of both parties, may do the following: (a) Order either party to pay a reasonable amount for the cost to the other party of

maintaining or responding to an action affecting the family and for attorney fees to either party.

Respectfully submitted
this 28th day of October, 2002.

s/ David Arnold

Name: David Arnold
Address: 3535 N 97th Street
Milwaukee, WI 53222
Telephone # : 414.462.2737

RELATED WISCONSIN STATUTES

767.045 Guardian ad litem for minor children.

(1) APPOINTMENT. (a) The court shall appoint a guardian ad litem for a minor child in any action affecting the family if any of the following conditions exists:

1. The court has reason for special concern as to the welfare of a minor child.

2. Except as provided in par. (am), the legal custody or physical placement of the child is contested.

(am) The court is not required to appoint a guardian ad litem under par. (a) 2. if all of the following apply:

1. Legal custody or physical placement is contested in an action to modify legal custody or physical placement under s. 767.325 or 767.327.

2. The modification sought would not substantially alter the amount of time that a parent may spend with his or her child.

3. The court determines any of the following:

a. That the appointment of a guardian ad litem will not assist the court in the determination regarding legal custody or physical placement because the facts or circumstances of the case make the likely determination clear.

b. That a party seeks the appointment of a guardian ad litem solely for a tactical purpose, or for the sole purpose of delay, and not for a purpose that is in the best interest of the child.

(4) RESPONSIBILITIES. The guardian ad litem shall be an advocate for the best interests of a minor child as to paternity, legal custody, physical placement and support.

(6) COMPENSATION. The guardian ad litem shall be compensated at a rate that the court determines is reasonable. The court shall order either or both parties to pay all or any part of the compensation of the guardian ad litem. In addition, upon motion by the guardian ad litem, the court shall order either or both parties to pay the fee for an expert witness used by the guardian ad litem, if the guardian ad litem shows that the use of the expert is necessary to assist the guardian ad litem in performing his or her functions or duties under this chapter.

767.24 Custody and physical placement. (1) GENERAL PROVISIONS. In rendering a judgment of annulment, divorce, legal separation or paternity, or in rendering a judgment in an action under s. 767.02 (1) (e) or 767.62 (3), the court shall make such provisions as it deems just and reasonable concerning the legal custody and physical placement of any minor child of the parties, as provided in this section.

(1m) PARENTING PLAN. In an action for annulment, divorce orlegal separation, an action to determine paternity or an action under s. 767.02 (1) (e) or 767.62 (3) in which legal custody or physical placement is contested, a party seeking sole or joint legal custody or periods of physical placement shall file a parenting plan with the court before any pretrial conference. Except for cause shown, a party required to file a parenting plan under this subsection who does not timely file a parenting plan waives the right to object to the other party's

parenting plan. A parenting plan shall provide information about the following questions:

(a) What legal custody or physical placement the parent is seeking.

(b) Where the parent lives currently and where the parent intends to live during the next 2 years. If there is evidence that the other parent engaged in interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12

(1) (am), with respect to the parent providing the parenting plan, the parent providing the parenting plan is not required to disclose the specific address but only a general description of where he or she currently lives and intends to live during the next 2 years.

(c) Where the parent works and the hours of employment. If there is evidence that the other parent engaged in interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), with respect to the parent providing the parenting plan, the parent providing the parenting plan is not required to disclose the specific address but only a general description of where he or she works.

(d) Who will provide any necessary child care when the parent cannot and who will pay for the child care.

(e) Where the child will go to school.

(f) What doctor or health care facility will provide medical care for the child.

(g) How the child's medical expenses will be paid.

(h) What the child's religious commitment will be, if any.

(i) Who will make decisions about the child's education, medical care, choice of child care providers and extracurricular activities.

(j) How the holidays will be divided.

(k) What the child's summer schedule will be.

(L) Whether and how the child will be able to contact the other parent when the child has physical placement with the parent providing the parenting plan.

(m) How the parent proposes to resolve disagreements related to matters over which the court orders joint decision making.

(n) What child support, family support, maintenance or other income transfer there will be.

(o) If there is evidence that either party engaged in interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), with respect to the other party, how the child will be transferred between the parties for the exercise of physical placement to ensure the safety of the child and the parties.

767.24 (4) ALLOCATION OF PHYSICAL PLACEMENT.

(a) 1. Except as provided under par. (b), if the court orders sole or joint legal custody under sub. (2), the court shall allocate periods of physical placement between the parties in accordance with this subsection. 2. In determining the allocation of periods of physical placement, the court shall consider each case on the basis of the factors in sub. (5). The court shall set a placement schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each parent, taking into account geographic separation and accommodations for different households.

(b) A child is entitled to periods of physical placement with both parents unless, after a hearing, the court finds that physical placement with a parent would endanger the child's physical, mental or emotional health.

(c) No court may deny periods of physical placement for failure to meet, or grant periods of physical placement for

meeting, any financial obligation to the child or, if the parties were married, to the former spouse.

(cm) If a court denies periods of physical placement under this section, the court shall give the parent that was denied periods of physical placement the warning provided under s. 48.356.

(d) If the court grants periods of physical placement to more than one parent, it shall order a parent with legal custody and physical placement rights to provide the notice required under s. 767.327 (1).

(5) FACTORS IN CUSTODY AND PHYSICAL PLACEMENT DETERMINATIONS.

In determining legal custody and periods of physical placement, the court shall consider all facts relevant to the best interest of the child. The court may not prefer one parent or potential custodian over the other on the basis of the sex or race of the parent or potential custodian. The court shall consider the following factors in making its determination:

(a) The wishes of the child's parent or parents, as shown by any stipulation between the parties, any proposed parenting plan or any legal custody or physical placement proposal submitted to the court at trial.

(b) The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.

(c) The interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest.

(cm) The amount and quality of time that each parent has spent with the child in the past, any necessary changes to the parents' custodial roles and any reasonable life–style changes that a parent proposes to make to be able to spend time with the child in the future.

(d) The child's adjustment to the home, school, religion and community.

(dm) The age of the child and the child's developmental and educational needs at different ages.

(e) The mental and physical health of the parties, the minor children and other persons living in a proposed custodial household.

(em) The need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for the child.

(f) The availability of public or private child care services.

(fm) The cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party.

(g) Whether each party can support the other party's relationship with the child, including encouraging and facilitating frequent and continuing contact with the child, or whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.

(h) Whether there is evidence that a party engaged in abuse, as defined in s. 813.122 (1) (a), of the child, as defined in s. 48.02(2).

(i) Whether there is evidence of interspousal battery as described under s. 940.19 or 940.20 (1m) or domestic abuse as defined in s. 813.12 (1) (am).

(j) Whether either party has or had a significant problem with alcohol or drug abuse.

(jm) The reports of appropriate professionals if admitted into evidence.

(k) Such other factors as the court may in each individual case determine to be relevant.

(e) In an order of physical placement, the court shall specify the right of each party to the physical control of the child in sufficient detail to enable a party deprived of that control to implement any law providing relief for interference with custody or parental rights.

767.325 Revisions of legal custody and physical placement orders.

(1)(b) After 2-year period.

1. Except as provided under par. (a) and sub. (2), upon petition, motion or order to show cause by a party, a court may modify an order of legal custody or an order of physical placement where the modification would substantially alter the time a parent may spend with his or her child if the court finds all of the following:

a. The modification is **in the best interest of the child**.

b. There has been a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.

2. With respect to subd. 1., there is a rebuttable presumption that:

a. Continuing the current allocation of decision making under a legal custody order is in the best interest of the child.

b. Continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child.

3. A change in the economic circumstances or marital status of either party is not sufficient to meet the standards for modification under subd. 1.

The issues in this case is not just about legal concepts and to promote debate amongst attorneys, judges or Justices.

To remind the court that the issues in the case is about real families, children and their parents, below is a picture of David Arnold and the three children whose parental relationship has been negatively impacted by the State court rulings in this case.